No. 15638

United States
Court of Appeals
for the Ninth Circuit

KEMART CORPORATION, a corporation,
Appellant,

vs.

PRINTING ARTS RESEARCH LABORATORIES, INC., a corporation,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-16-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the Supreme Court of Ohio
Error to the Court of Appeals of Cuyahoga County

Case No. 21428

Harry J. McCue, Plaintiff in Error,

vs.

Hugh Wells, Trustee The Henry Gehring Company, a Corporation, Defendant in Error.

[Printed Record Beginning on Page 1]

PETITION IN ERROR

[Filed in Supreme Court Jan. 30, 1929.]

Now comes Harry J. McCue, Plaintiff in Error, and respectfully represents that at the September, 1928, term of the Court of Appeals in and for Cuyahoga County, State of Ohio, to wit: on the 8th day of September, 1927, the Defendant in Error, The Henry Gehring Company, recovered judgment against the Plaintiff in Error, Harry J. McCue, in which cause this Plaintiff in Error was Plaintiff in Error and the Defendant in Error was Defendant in Error, being cause No. 8833 on the docket of said court; that by said judgment of said Court of Appeals, a judgment of the Court of Common Pleas of Cuyahoga County, Ohio, in favor of the Defendant in Error in an action in which said Defendant in Error was Defendant, and the Plaintiff in Error was Plaintiff, was affirmed.

This Plaintiff in Error further says that by virtue

of an order of the Court made and entered on the 23rd day of January, 1929, his Motion for an order requiring said Court of Appeals of Cuyahoga County to certify its record to this court, for review and final determination was granted. A certified copy of the Docket and Journal Entries, together with the original papers, Bill of Exceptions, and proceedings in said cause are filed herewith and made a part hereof.

Plaintiff in Error says that there is error in said record and proceedings prejudicial to the Plaintiff in Error, in this, to wit:

1: Said Court of Appeals erred in affirming the judgment of the Common Pleas Court of Cuyahoga County, which was in favor of the Defendant in Error.

2: Said Court of Appeals erred in failing to reverse said judgment of the Court of Common Pleas of Cuyahoga County.

3: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in overruling the Supplemental Motion for a New Trial of the Plaintiff in Error on the ground of newly discovered evidence.

4: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in its charge to the jury on the trial of said action.

5: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in admitting evidence of said Defendant in Error to which Plaintiff in Error objected.

6: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in rejecting evidence offered by Plaintiff in Error.

7: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in overruling the motion of the Plaintiff in Error for a directed verdict at the close of the case of the Defendant in Error.

8: Said Court of Appeals erred in holding that the Court of Common Pleas committed no error in overruling the Motion of the Plaintiff in Error at the close of the whole case.

9: Said Court of Appeals erred in failing to hold that said judgment of the Court of Common Pleas was manifestly against the weight of the evidence.

10: Said Court of Appeals erred in failing to hold that excessive damages had been given under the influence of passion or prejudice.

11: Said Court of Appeals erred in holding that the verdict is sustained by the evidence.

12: Said judgment of the Court of Appeals is contrary to law and the evidence.

13: Other errors apparent on the fact of the record.

JOY SETH HURD,
Attorney for Plaintiff in Error.

Waiver of Summons follows.

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PETITION

[Filed in Common Pleas Court Feb. 6, 1925.]

Comes now the plaintiff, The Henry Gehring Company, and for its cause of action against the defendant says that it is a corporation duly organized and existing according to law, and is and has been engaged in the business of manufacture, sale and use of dispensers of liquid beverages; that the defendant is doing business under the trade name of The Humphrey Dispenser Company, and is also in the business of manufacturing vending machines for the dispensing of beverages.

Now the plaintiff says that heretofore, and particularly during the month of September, 1924, but also before and after said date, the defendant wrote and sent through the United States Mails to various of the customers of the plaintiff communications reading as follows:

"The Humphrey Dispenser Company and the writer, owning and operating under the Humphrey Patents on Dispenser apparatus and Processes of David S. Humphrey, have, after being advised by Patent Lawyers of New York and two firms in Cleveland, brought suit to enjoin the use of Polar Spray Dispensing devices, because they infringe the Humphrey Process patent No. 1,243,068.

It is our intention to proceed against all infringements of these patents, and to prosecute them vigorously. At the present time we have started suit against Henry Gehring Company in the United

States Court of Cleveland for using and selling the Polar Spray dispensing apparatus, as its use constitutes infringement of that patent and possibly others.

We have previously actually filed another suit to enjoin infringement by a similar apparatus, and have instructed our Patent Lawyers to bring additional suits, which they are now preparing to do.

If you desire any further information we refer you to Bates, Macklin, Golrick and Teare, of Cleveland, who are handling this litigation.

It occurred to the writer that a word of warning would be considered by you to be valuable, and it may lead to avoiding trouble in the future."

Now the plaintiff says that the defendant, for the purpose of harassing and annoying the plaintiff and embarrassing it in and about the sale of its goods, wares and merchandise, filed a suit in the United States District Court for the Northern District of Ohio, Eastern Division, against this plaintiff, same being case No. 1279 upon the equity docket of said court, and falsely alleging a patent infringement; that thereupon and thereafter the said defendant proceeded to circularize the customers of the plaintiff with highly improper and damaging communications of the kind, character and nature set forth herein, and communicated by telephone, by word of mouth and otherwise with the customers of the defendant, threatening them with litigation and falsely accusing the plaintiff of infringing the letters patent of defendant, and that through and by

such methods of unfair competition the defendant caused a large portion of the trade of the plaintiff to be interrupted, halted and stopped, and prevented customers and prospective customers of the plaintiff from making purchases, and caused an injury and damage to the plaintiff in the sum of Twenty-five Thousand Dollars ($25,000.00).

Wherefore, plaintiff prays judgment against the defendant in the sum of Twenty-five Thousand Dollars ($25,000.00), and for its costs.

THE HENRY GEHRING
COMPANY,
By HENRY GEHRING,
President,
TURNEY & SIPE,
Its Attorneys.

Duly Verified.

ANSWER AND CROSS PETITION

[Filed in Common Pleas Court Dec. 1, 1926.]

Answer

Now comes the defendant and admits that the plaintiff is a corporation duly organized and existing according to law, and that the defendant at the time of filing said petition was doing business under the trade name of the Humphrey Dispenser Company and is in the business of manufacturing machines and improvements for dispensing of beverages.

Defendant also admits sending through the

United States mails to various persons and firms a letter, copy of which is substantially as set forth in plaintiff's petition. Defendant also admits the filing of a suit in the United States District Court for the Northern District of Ohio, Eastern Division, against the plaintiff herein, said cause being No. 1279 upon the equity docket of said court.

Each and every other allegation in said petition contained this answering defendant denies generally and specifically and prays that the petition of plaintiff against him may be dismissed at plaintiff's costs and the defendant awarded judgment against the plaintiff on his cross petition as hereinafter set forth.

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SUPPLEMENTAL ANSWER AND COUNTER CLAIM

[Filed in Common Pleas Court June 10, 1927.]

Now comes the defendant and by way of supplemental answer and counter claim, says that since the commencement of this action by the plaintiff and on or about the 7th day of May, 1927, the plaintiff was duly adjudged a bankrupt by the United States District Court for the Northern District of Ohio, Eastern Division, and one, Hugh Wells, was duly appointed, selected and qualified as plaintiff's trustee and thereupon, all of the property, including the claim in this suit, vested in said trustee, and defendant asks that said trustee be made a party to this action.

Defendant admits that prior to the said adjudication in bankruptcy that the plaintiff was a corporation duly organized and existing according to law and that the defendant at the time of filing of said petition was doing business under the trade name of the Humphrey Dispenser Company and was in the business of manufacturing machines and improvements for dispensing of beverages. Defendant also admits sending through the United States mails to various persons and firms a letter, copy of which is substantially as set forth in plaintiff's petition.

Defendant also admits the filing of a suit in the United States District Court for the Northern District of Ohio, Eastern Division, against the plaintiff herein, said cause being No. 1279 upon the equity docket of said court, and that said suit was dismissed without prejudice upon application of the defendant and by authority of said court. Defendant further says that the statements contained in said letter and letters, are true and that said letters were written and sent in good faith and upon advice of competent counsel skilled in such matters.

Each and every other allegation in said petition contained this answering defendant denies generally and specifically and prays that the petition of plaintiff against him may be dismissed at plaintiff's costs and the defendant awarded judgment against the plaintiff on his counter claim as hereinafter set forth.

[Title of Supreme Court and Cause.]

BRIEF ON BEHALF OF PLAINTIFF IN ERROR BEGINNING ON PAGE 10

Argument and Law

The court erred in rejecting the evidence offered by the defendant below tending to show the truth of the statements complained of as libelous. Reference is now made to the petition of the plaintiff and particularly the letter incorporated therein. This letter and similar letters (Record page 14, Exhibits B, C, D, E and F) is the basis of the entire complaint against the defendant.

The gist of the complaint is that the statements contained in this letter are not true; that these letters falsely allege a patent infringement and threaten litigation and falsely accuse the plaintiff of infringing the Letters Patent of the defendant. If the statements contained in this letter are untrue, the defendant would be guilty of libel, and under the law, if the plaintiff could show that said letter was untrue and that the defendant had sent the same with malice and that special damages had resulted, it would be entitled to recover against the defendant. We maintain that this action by whatever name it may be called, is, when properly analyzed, an action for damages for libel, or slander of title of plaintiff's personal property, the gist of the complaint being that the defendant has falsely accused the plaintiff of infringing upon the Letters Patent of the defendant.

This proposition was covered by our Supreme Court in an early Ohio case entitled "Watson vs. Trask, 6 O. 531," wherein it was held:

"Publishing that a man's business is an infringement of another's patent, and warning the public against buying from him, is libelous."

Watson vs. Trask, 6 Ohio 531.

The defendant in this case is charged with such a libel and in defense has pleaded and offered to prove that the statements claimed to be false are in fact true. We submit that it is the law of Ohio that the truth of the statements made or printed, is a complete defense.

Section 11342 of the General Code of Ohio is as follows:

"In an action for libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages."

This is the general law throughout the United States with respect to actions for slander and libel.

"The rules governing the admissibility of evidence generally are applicable to the admission of evidence to prove the truth of the defamatory words in an action for libel or slander and so all facts and circumstances bearing directly on the charge and tending to prove its truth may be introduced in support thereof."

17 R.C.L., Sec. 170, 412.

This ruling is supported by many cases as follows:

Stow vs. Converse, 3 Conn. 325, 8 Am. Dec., 189;

Barry vs. McCollom, 81 Conn. 293, 70 Atl. 1035, 129 A. S. R. 215;

Burt vs. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97;

Uhlman vs. Farm, etc., Co., 126 Minn. 239, 148 N. W. 102, Ann. Cas. 1915 D 888 and note;

Weltmer vs. Bishop, 181 Mo. 110, 71 S. W. 167, 65 L. R. A. 584;

Woolley vs. Plaindealer Publ. Co., 47 Ore. 619, 84 Pac. 473, 5 L. R. A. (N.S.) 498;

Cotulla vs. Kerr, 74 Tex. 89, 11 S. W. 1058, 15 A. S. R. 819.

"At common law and often times by force of constitutional or statutory provision under some limitations, truth of a charge is a defense to a civil action for defamation. In the absence of the statutory or constitutional provision to the contrary, the general rule is that in all civil actions of libel or slander, defendant is justified in law and exempt from all civil responsibility, where he alleges and establishes the truth of the matter charged as defamatory, whether the words are actionable per se or per quod and notwithstanding the publication was malicious, or without reason on the part of the defendant to believe the imputation to be true; and it has been held that proof of the truth of the charge is a complete defense, regardless of the innuendo annexed."

36 C. J., 1231, Sec. 193, and a long list of cases thereunder cited.

The defendant, in the trial of the case, (Record pages 148-149-150-151), offered to prove the truth of the letters complained of by showing that the device used by the plaintiff was in fact an infringement of the Letters Patent of the defendant. The defendant offered to prove the same by testimony of an expert witness called for the purpose of giving expert testimony. He had qualified as an expert witness, but was not permitted by the court to give testimony tending to show that the charge made in the letter that the plaintiff had been infringing the patent rights of the defendant, was true. The court refused to permit this testimony on the ground that such testimony was for the exclusive jurisdiction of the Federal Court, for the reason that the Federal Court has jurisdiction exclusively in the matter of questions involving infringement and patent rights, the court saying: (Record page 151)

"The court has no jurisdiction to inquire into cases of the infringement of a patent." (Record page 151)

The defendant objected to and excepted to the ruling of the court and made the offer to prove, by the opinion of the expert witness, the truth of the letters referred to as Plaintiff's Exhibits B, C, D, E and F by showing that the same, (the polar spray dispensing apparatus) was an infringement of the defendant's patent. (Record page 151)

The court, throughout the trial of the case, re-

fused to permit any testimony on the part of the defendant, tending to show that the plaintiff had in fact been infringing upon the patent rights of the defendant and that the statements contained in the letters complained of were in fact true. This action of the court in refusing to permit the testimony which would show the truth of the statements contained in the letter and complained of, on the ground that such testimony could not be offered in a State Court, but was for the exclusive jurisdiction of the Federal Court, combined to deprive the defendant of his day in court and was prejudicial error on the part of the court.

We respectfully submit that either the Court of Common Pleas did not have jurisdiction of the action, or if it did have jurisdiction of the action, then the defendant was entitled to present his defense, even though it did involve a question affecting the infringement of a patent right.

As will be noted further in this brief, we contend that the burden of proof in this case was upon the plaintiff to prove the falsity of the publication in the first instance, as well as malice and special damage before he would be entitled to recover. If this is accepted as the law of the case, as we believe it should be, not only is a defendant entitled to allege and prove the truth of statements in such a case, but the burden is upon the plaintiff to prove the falsity in the first instance, on the theory that this is an action not for a libel of a person, but for slander of title, so called, which is in the nature of

an action of trespass on the case for special damages sustained by reason of the speaking or the publication of the slander or libel of the plaintiff's title. This type of action has been denominated "slander of title" by a sort of figure of speech in which the title is personified and is subject to many of the rules applicable to personal slander and libel, when the words themselves are not actionable. We will treat on this subject under the head of: "Error on the part of the court in refusing to direct a verdict upon the close of the plaintiff's case" and also, "Error on the part of the court in refusing to direct a verdict at the close of the whole case" and also, "for error on the part of the Court in its charge to the jury." In any event we submit that the defendant should have been permitted to show the truth as a defense.

Error of the Court in Refusing to Direct a Verdict for the Defendant at the Close of Plaintiff's Case.

The court committed error in not granting the motion of the defendant to arrest the testimony from the jury and to direct a verdict for the defendant on the ground that the plaintiff had not introduced evidence sufficient to constitute a cause of action. That the instant case comes within that class of cases known in law as "slander of title or property" there can be no question, and by reason thereof there can be no question that the rules of law governing such cases are applicable to the instant case.

Slander of Title, or Disparagement of Property Defined.

An action for slander of title is an action for special damage sustained by reason of the speaking of slander of the plaintiff's title to property.

"The action in its nature is not properly for words spoken or for a libel written or published, but is in the nature of an action of trespass on the case for special damages sustained by reason of the act of the defendant. The cause of action is denominated 'slander of title' by a sort of figure of speech in which the title is personified and is subject to many of the rules applicable to personal slander when the words themselves are not actionable. The action lies for the slander of title to personalty, as well as realty. Numerous illustrations of circumstances giving rise to the action may be given."

17 R. C. L., Sec. 216, pg 454.

It is held that this type of action covers the malicious charge that plaintiff has infringed the patent rights of the defendant:

"An action lies also for a malicious charge that the plaintiff has infringed the patent rights of the defendant, thereby injuring the plaintiff in the sale of his merchandise."

17 R. C. L., Sec. 216, p. 455. (About middle of page.)

Numerous cases are cited for this proposition as follows:

Flint vs. Hutchinson Smoke Burner Company,

110 Mo. 492, 19 S. W. 804; 33 A. S. R. 476, 16 L. R. A. 243;

Hovey vs. Rubber Tip Pencil Company, 57 N. Y. 119; 15 Am. Rep. 470, wherein the action was dismissed on other grounds.

Corpus Juris defines it as follows:

"The term 'slander of title' has by common use become a well known and recognized phrase of the law. The original application of the term 'slander' was applied more to words or utterances, the nature of which were defamatory to the character of an individual. The term however, has been applied to utterances and words made with reference to property, whether real or personal. The action is denominated 'slander of title' by a sort of figure of speech in which the title is personified. Slander of title may be defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some right of his causing him special damage."

37 C. J., 129, Sec. 591, and numerous cases therein cited in support of the text, similar definitions being given as follows:

"Utterance of false and malicious statements disparaging the title to property in which one has an estate or interest, if the statements are untrue and cause damage, constitutes slander of title."

Kelly vs. Rothsay 1st State Bank, 145 Minn. 331, 332; 177 N. W. 347, 9 A. L. R. 929.

"Slander of title, as recognized by the law, may be defined to be defamation of title to property, real or personal, by one who falsely and maliciously

disparages the title thereto and thereby causes the owner thereof some special pecuniary loss or damage."

Farren vs. Fodera, 169 Cal. 370, 379. 148 P. 200, 202.

That this applies to cases involving title of letters patent, copyrights, etc., is quite well settled.

"An action will lie for slander of title to letters patent, copyrights or trademarks."

37 C. J., 130, Sec. 595 and cases thereunder cited.

In addition to the case of Flint vs. Hutchinson Smoke Burner Company, 110 Mo. 492, there is cited also, Meyrose vs. Adams, 12 Mo. A. 329; Germproof Filter Company vs. Pasteur Chamberland Filter Company, 81 Hun. par. 49, 30 N. Y. S. 584; Hygienic Fleeced Underwear Company vs. Way, 35 Pa. Super 229.

In all of these cases involving slander of title, the words spoken or printed are not in themselves actionable.

"But the publication of false and malicious statements disparaging of plaintiff's property, or the title thereto, when followed as a natural, reasonable and proximate result by special damage to the owner, are actionable. The false statement may consist of an assertion that plaintiff has no title to the property of which he is the ostensible owner, or that his title is defective, or that defendant has an interest in, or lien upon the property."

37 C. J., Sec. 594, p. 130.

As distinguished from the rule of those cases where the words are actionable per se, in slander of

title cases the words are not actionable per se and the duty is upon the plaintiff to allege and prove:

1. The falsity of the statement of charge.
2. The malice of the charge.
3. Special damages.
4. Publication.

As to Falsity of Charge

The falsity of the words published is a necessary element to maintain the action.

"If the alleged defect or infirmity in title or property exists, the action will not lie."

37 C. J., Sec. 597, p. 131.

"The burden of proof is upon the plaintiff to establish his cause of action, this rule being applied to the falsity of the publication."

37 C. J., 134, Sec. 614.

As to Question of Malice

It has been universally held that it is essential that the plaintiff prove that the defendant acted maliciously and that malice is an essential element of the action.

"Malice is a necessary ingredient to entitle plaintiff to recover. Indeed it is said that malice is the gist of the action. The action cannot be maintained if the claim was asserted by defendant in good faith and if the act complained of was founded upon probable cause or was prompted by a reasonable belief, although the statement may have been false."

37 C. J., 131, Sec. 598.

"In an action for slander or title or for dispar-

agement of goods or property, it is essential that the plaintiff prove that the defendant acted maliciously in uttering the words in question."

17 R. C. L., Sec. 218, p. 456.

As to Question of Special Damages

The plaintiff must allege and prove special damages.

"The utterance of a mere falsehood, however malicious, is not alone sufficient to sustain an action for slander of title or property. Special damages are the gist of the action and without them the action cannot be maintained. Plaintiff must have sustained a pecuniary loss as the direct and natural result of the publication of the words. There can be no right of action when the damages result not from the plaintiff's act, but from the voluntary act of the defendant."

37 C. J., 132, Sec. 600.

"As words spoken of property are not in themselves actionable and special damages essential to maintain the action, an averment of special damage is necessary. It is necessary to allege the facts which show wherein plaintiff has sustained damage and such damage must be distinctly and particularly set out. An allegation of loss in general terms is not sufficient. The complaint or petition must show that the damages are the natural and probable consequence of the slander."

37 C. J., 132, Sec. 600.

We have examined the cited cases on this subject and find that the subject matter of these cases is analagous to the subject matter of the instant case.

For instance, in the case of Flint vs. Hutchinson Smoke Burner Company, 110 Mo. 492, the complaint alleged that the defendant falsely and maliciously notified persons to whom the plaintiffs were about to sell their device, that it infringed the defendant's patents.

In the case of Meyrose et al. vs. Adams, et al., 12 Mo. App. Rep. 329, the petition alleges that the plaintiffs were engaged in the manufacture and sale of lanterns, doing an extensive and profitable business and that the defendants, intending to injure the plaintiffs, did write and circulate among plaintiff's patrons, false and malicious statements to the effect that if any person bought lanterns from the plaintiff, he would be subject to a suit, since these Letters Patents, Licenses, granted by the owner to the plaintiff, had been revoked.

In the case of Hovey et al. vs. Rubber Tip Pencil Company, 57 N. Y., 119, the complaint of the plaintiff alleged in substance that they were the owners of a valuable right, secured by Letters Patent, and were engaged in the manufacture of the patented article and that the defendant had printed, published and circulated a circular claiming it to be the owner of various Letters Patent securing such right and was exclusively authorized to make and sell such patent articles and threatening prosecution for infringement of its right, in consequence whereof plaintiffs were injured.

In the case of Fant vs. Sullivan, Texas Civil Appeals, 152 S. W. 515, and in the case of Cardon vs. McConnell, 120 N. C. 461; 27 S. E. 109, Supreme

Court of N. Carolina, similar complaints were made.

In all of these cases the courts held that it was essential that the plaintiff allege and prove special damage, the falsity of the publication and malice. The facts in these cases are similar to the case at bar, as in the case at bar the plaintiff complains that the defendant, by letter and word of mouth, notified its customers that the article of the plaintiff was an infringement upon the patent rights of the defendant, in this case the article being a machine for carbonating beverages.

In the instant case, however, while the falsity of the statement was alleged in the petition, malice was not alleged, neither were special damages alleged. A careful reading of the record of the plaintiff's testimony shows that there was no evidence introduced by the plaintiff showing, or tending to show that the publication complained of was false. There was not a scintilla of evidence showing, or tending to show any malice on the part of the defendant and there was no evidence introduced showing special damages. As these elements were an essential part of the plaintiff's case, the burden being upon the plaintiff to introduce evidence on these points, the court should have sustained the Motion of the defendant to direct a verdict at the close of plaintiff's case.

* * * * *

For all the foregoing reasons, the record failing to show any evidence by the plaintiff tending to show the falsity of the publication and failing to

show any evidence tending to prove malice on the part of the defendant and failing to show any special damage, the Motion to direct the verdict at the close of plaintiff's case should have been sustained and the Motion to direct a verdict at the close of the whole case should have been sustained.

We shall now take up the question of error of the court in its charge to the jury.

* * * * *

The Supreme Court of the State of Ohio,
Of the Term of January, A. D. 1956

To wit: Wednesday, May 28, 1929

ERROR TO THE COURT OF APPEALS
OF CUYAHOGA COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the Judgment of the said Court of Appeals be and the same is hereby, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and said cause is hereby remanded to the Common Pleas Court of Cuyahoga County for a new trial.

* * * * *

Certification Attached.

[Endorsed]: No. 15638. United States Court of Appeals for the Ninth Circuit. Kemart Corporation, a corporation, Appellant, vs. Printing Arts Research Laboratories, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 22, 1957.

Docketed: July 22, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.